IN THE SUPREME COURT

Appeal from the Court of Appeals
(No. 250539)
Joel P. Hoekstra, Presiding Judge

MARCIA VAN TIL,

Plaintiff-Appellant, **Docket No. 128283**

v.

ENVIRONMENTAL RESOURCES MANAGEMENT, INC., a Pennsylvania Corporation doing business in Michigan and its officers, agents and employees,

Defendants-Appellees.
_____/

BRIEF ON APPEAL--APPELLANT

ORAL ARGUMENT REQUESTED

Thomas J. Wuori (P41096)
Deborah K. Palmer (P67957)
Attorney for Plaintiff-Appellant
BUSINESS ADDRESS:
HALPERT, WESTON, WUORI & SAWUSCH, P.C.
136 E. Michigan Ave., Ste. 1050
Kalamazoo, MI 49007
Telephone: 269-388-4800

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

DATE AND NATURE OF ORDERS BEING APPEALED

Court of Appeals

Application for Leave to Appeal was sought in this Court from the Court of Appeals' Opinion dated February 10, 2005, addressing in this negligence action an appeal by Plaintiff-Appellant of an Order granting Defendant-Appellee summary disposition and a cross-appeal by Defendant-Appellee of an Order granting Plaintiff-Appellant summary disposition. The Court of Appeals Opinion dated February 10, 2005, from which leave was sought and granted is attached. *(Appendix 187a).*

Trial Court

An Order was entered by the Ottawa County Circuit Court on August 8, 2003 *(Appendix 29a).* The Final Order entered on that date disposed of all of the claims and adjudicated the rights and liabilities of all parties pursuant to the Court's Order dated August 22, 2003 *(Appendix 30a).* The Claim of Appeal was filed on August 22, 2003, which incorporated the appeal of the trial court's Opinions and Orders dated July 18, 2003 *(Appendix 22a)* and August 8, 2003 *(Appendix 29a).* Trial Court's Opinion and Order dated June 2, 2003 *(Appendix 17a)* Opinion and Order dated July 18, 2003 *(Appendix 22a)*; Order dated August 8, 2003 *(Appendix 29a)* and Final Order dated August 27, 2003 formed the basis of the appeal to the Court of *Appeals (Appendix 30a).*

STATEMENT OF APPELLATE JURISDICTION

This Honorable Court has jurisdiction over this appeal by leave pursuant to MCR 7.301(A)(2) *(Appendix 287a)* and 7.302 (Application for Leave to Appeal) *(Appendix 289a)*. This Court entered its Order granting Plaintiff-Appellant's Application for Leave to Appeal on November 3, 2005 *(Appendix 218a)*.

STANDARD OF REVIEW

A. The issue of subject-matter jurisdiction involves statutory interpretation and presents a question of law. *Lapeer Co. Clerk v. Lapeer Circuit Judges*, 465 Mich 559, 640 NW2d 567 (2002). Questions of law are reviewed *de novo. Id.* The Court has raised the jurisdictional issue, involving the scope of judicial power, and this too involves *de novo* review (and the matter was not addressed in the lower courts). *Warda v. Flushing City Council*, 472 Mich 326, 696 NW2d 671 (2005).

The interpretation of statutes is "to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v. Ameritech Services, Inc*, 466 Mich 304, 312, 645 NW2d 34 (2002). If the statute is unambiguous, judicial construction is neither required nor permitted. Courts cannot venture beyond the unambiguous language of the statute. *Id.*

B. Appellate review of a trial court ruling on a motion for summary disposition under MCR 2.116(C)(4) *(Appendix 281a)* is *de novo* in order to determine if the moving party was entitled to judgment as a matter of law, or whether affidavits and other proofs show that there was no genuine issue of material fact. *Herbolsheimer v SMS Holding Co.*, 239 Mich App 236, 240; 608 N.W.2d 487 (2000).

Appellate review of a trial court ruling on a motion for summary disposition under MCR 2.116(C)(10) *(Appendix 282a)* is also *de novo*. *Spiek v Dep't of Transportation,* 456 Mich 331 (1998). That motion tests the factual basis for the claim. *Maiden v. Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999).

The existence of an employment relationship is a question of law for the Court to decide if the evidence is reasonably susceptible of only one inference. *Clark v United*

Technologies Automotive, Inc., 459 Mich 681, 694; 594 NW2d 447 (1999). If evidence of an employee status is disputed or if conflicting inferences may reasonably be drawn from the known facts, the issue is one for the trier of fact. *Chaffee v Stenger*, 361 Mich 57; 104 NW2d 805 (1960).

The interpretation of statutes is a question of law and error may be committed by basing a finding of fact on misconception of law and by failing to correctly apply the law to the finding of fact and error may also be committed by a trial court when an erroneous legal standard or framework is employed or a decision is based on erroneous legal reasoning. In such cases, *de novo* review is appropriate. *Hoste v Shanty Creek Management Inc,* 459 Mich 561, 569; 592 NW2d 360; reh den 460 Mich 1202 (1999).

STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE WORKER'S COMPENSATION STATUTE PROHIBITS THE CIRCUIT COURT'S JURISDICTION TO HEAR TORT CLAIMS WHERE THE DEFENSE ASSERTS AN EMPLOYER/EMPLOYEE RELATIONSHIP

Plaintiff-Appellant answers "No."
Defendant-Appellee answers "____."

II. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S RULING THAT MARCIA VAN TIL WAS NOT AN EMPLOYEE WITHIN THE MEANING OF THE WORKER'S DISABILITY COMPENSATION ACT WHERE SHE WAS NOT UNDER ANY CONTRACT OF HIRE OR PAID ANY PAYMENT INTENDED AS WAGES

Plaintiff-Appellant answers "Yes."
Defendant-Appellee answers "No."
Court of Appeals said "No."
Trial Court ruled "Yes."

III. WHETHER THE TRIAL COURT ERRED IN RULING THAT ERM WAS THE STATUTORY EMPLOYER FOR MARCIA VAN TIL WHERE THE FACTS OF THE CASE ARE COMPLETELY INAPPLICABLE TO THE ENTIRE STATUTORY SCHEME

Plaintiff-Appellant answers "Yes."
Defendant-Appellee answers "No."
Court of Appeals ruled "Moot."
Trial Court ruled "No."

STATEMENT OF FACTS

A. Factual Background[1]

On February 3, 2001 Plaintiff-Appellant Marcia Van Til (Marcia) was a 57 year-old mother and spouse. She was married to Byron Van Til (Byron). Deposition of Marcia Van Til, pg. 5 *(Appendix 233a)*. Byron Van Til was the regular janitor for Defendant-Appellee Environmental Resources Management, Inc. (ERM). ERM owned a building in Holland, Michigan, which was where Bryon was and is the janitor. Part of Bryon's normal job duties that he performed included: maintaining the building, waxing floors, stripping floors, emptying trash, and other similar janitorial duties. Deposition of Byron Van Til, pg. 13 *(Appendix 220a)*. Byron was a janitorial employee of ERM, not an independent contractor, subcontractor, or otherwise. Affidavit of Byron Van Til, ¶ 7 *(Appendix 251a)*.

In early 2001, as part of his regular and routine job as a janitor, Byron needed to strip and wax the floors at the ERM facility. Deposition of Byron Van Til, pgs. 60-61 *(Appendix 227a-228a)*. It was a job that can take many hours to complete. If it took him ten hours to complete, he would take the ten hours to complete because maintenance of the floors was his responsibility. Deposition of Byron Van Til, pgs. 13, 14, and 61 *(Appendix 220a-221a and 228a)*. As a way of making it easier on him, Byron decided to volunteer his wife's services to help him (instead of a ten to fifteen hour job by himself she would help him do it in less time). Deposition of Byron Van Til, pgs. 60-62 *(Appendix 227a-229a)*.

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[1] All of the these facts were presented to the Court of Appeals (Appellant's Brief, at pgs. 1-8), and to the trial court in Plaintiff's Brief in Support of Plaintiff's Response to Defendant's Motion for Summary Disposition and Plaintiff's Cross Motion for Summary Disposition pgs. 3-9 (with corresponding exhibits) and Plaintiff's Motion for Reconsideration and Request for Rehearing and Brief in Support, pgs. 3-4 including exhibit 1 to that brief (Affidavit of Byron Van Til).

Marcia Van Til was separately employed full-time by another company at the time. Deposition of Marcia Van Til, pgs. 53-54 (emphasis added) *(Appendix 235a-236a)*. In her words,

> Q Let's talk about February 3, 2001 if we could. Do you remember that day?
> A Oh yes.
> Q Was that a Saturday as well?
> A Yes.
> Q Were you again going to be assisting Byron that day in stripping wax off the floors at the facility?
> A Yes, he volunteered my help.
> Q Now, you say that with a smile on your face. You're a take charge, assertive person.
> A Well, apparently he took charge of me because he came home and said he volunteered my help stripping the floors on Saturday.
> Q Did he ask you if you would help him?
> A No, he just said it.
> Q All right. You didn't have to do it if you didn't want to; true statement?
>
> 00054
> A True.
> Q You did it because it would be a help to Byron.
> A Yes.
> Q And again, it was your understanding that you would be paid for your time.
> . . . .
> BY THE WITNESS:
> A Byron told me they said they didn't want to hire me because of all the paperwork, they didn't want to do all the paperwork, so they didn't want to hire me.
> BY MR. COOPER:
> Q Did you say am I supposed to go in and give my time to them?
> A Byron told me that he was going to get money for my coming in.
> Q So it was your understanding before you showed up at the facility on February 3, 2001, that Byron's paycheck would be reflective of the time that you spent there that day.
> A Yes.
> Q That was okay with you?

24 A I didn't even think about it.

Id.

Since Byron did not have the authority to make any decisions at the company, he went to one of his bosses, Steve Koster, and asked him if Marcia could help him. Koster stated that it would be too much paperwork to hire her so they did not hire her. Deposition of Byron Van Til, pgs. 61-62 *(Appendix 228a-229a)*; Deposition of Steve Koster, pg. 12 *(Appendix 240a)*. She could help him and Byron would get paid for the job anyway (he would get paid for her hours, as he would have had he done the all the work). *Id.*

Thus, Byron went home and talked to Marcia: "Q: And [Marcia Van Til] testified that she came home one day and said you had volunteered her help to strip the floors here, is that true?" A: "That is the truth." Deposition of Byron Van Til, pg. 60, lines 13-16 *(Appendix 227a)*.

The only arrangement Marcia knew was that her husband "volunteered" her to help him strip a floor one Saturday. She "didn't think anything else about it." Affidavit of Marcia Van Til, ¶¶ 3 and 8 *(Appendix 254a)*. She never viewed herself as an employee of ERM and, in fact, was told by her husband that ERM did not want to "hire" her. Affidavit of Marcia Van Til, ¶ 10 *(Appendix 254a)*. Her husband would get paid for her hours.

The intent of Marcia Van Til was to help her husband, for which he would get paid money for the time she spent. She was a volunteer—in both her eyes and in the eyes of her husband. ERM manager, Steve Koster, told Byron, "[t]hat would be okay she helped me," and Byron told Koster they did not have to hire her. Deposition of

Byron Van Til, pg. 61 *(Appendix 228a)*. ERM specifically did not want to hire her because of the paperwork hassle. Deposition of Marcia Van Til, pgs. 54-55 *(Appendix 236a-237a)* and Deposition of Byron Van Til, pg. 61 *(Appendix 228a)*. ERM and Marcia Van Til had no arrangements, no discussions, no promises, other than she understood (1) her husband had volunteered her services to help him strip and wax the floor; (2) ERM was not going to hire her; and, (3) her husband would get money reflected in his paycheck for any hours she worked. She herself did not agree to anything with ERM, and ERM specifically represented that it was not going to hire her. Affidavit of Marcia Van Til, ¶ 10 *(Appendix 254a)*; Deposition of Byron Van Til, pgs. 60-61 *(Appendix 227a-228a)*. Mr. Van Til was, is, and has been a janitor at ERM. Mr. Van Til is not a contractor, subcontractor, and has no authority to, and has not, "contracted" with anyone for any of his floor care duties. He did not contract or subcontract with his spouse. Affidavit of Byron Van Til, ¶¶ 7-10 *(Appendix 251a-252a)*.

When she went to help her husband on February 3, 2001, she wore tennis shoes, jeans, and a regular shirt. She had no protective gear other than she had some non-protective gloves and glasses. Deposition of Byron Van Til, pg. 57-58 *(Appendix 224a-225a)*. ERM was using a strong and corrosive chemical to strip floors called Spartan Square One Heavy Duty Finish and Wax Stripper. Marcia never saw the chemical container or had anything to do with its preparation, mixture, or anything other than application. Deposition of Byron Van Til, pgs. 58-59 *(Appendix 225a-226a)*. ERM obtained no material safety data sheet for Square One, reviewed no information about the chemical, reviewed no safety protocol, and had no safety gear for this extremely caustic floor stripping compound, which is on order of one hundred times more caustic

than a prior chemical it had used. Deposition of Byron Van Til, pgs. 90-91 *(Appendix 230a-231a)*.

While Byron operated the power machine, Marcia was on her hands and knees scrubbing in the hard-to-get or "toe kick" areas of the floor. Deposition of Marcia Van Til, pg. 45 *(Appendix 234a)*. The caustic chemical seeped into her jeans and tennis shoes and basically began burning away at her layers of skin. She subsequently was treated at a local hospital before being transferred to Spectrum Burn Unit where she underwent extensive debridement and skin grafting for her second and third degree chemical burns.

Nobody from ERM ever talked to Marcia before she helped her husband or after she was injured. Deposition of Marcia Van Til, pg. 71 *(Appendix 238a)*; Affidavit of Marcia Van Til, ¶ 5-7 *(Appendix 254a)*. Vice-President LeRoy Dell talked to its janitorial employee Bryon Van Til. Deposition of Leroy Dell, at pg. 37-38 (incl. Attachment E) *(Appendix 247a-249a)*. Legally, there is a requirement for ERM to notify the workers' compensation bureau of injuries to its employees. MCL 418.801 and 418.805 *(Appendix 267a-268a)*. Nothing like that was done for or about Marcia, who was hospitalized for 14 days at the burn unit and whose medical bills and wage loss were never the subject of reporting to the Bureau. Deposition of Steve Koster, pg. 57 *(Appendix 244a)*; Deposition of Leroy Dell, pg. 30 *(Appendix 246a)*.

Marcia Van Til's health insurer, not worker's compensation, paid her medical bills. After the accident, ERM principals LeRoy Dell and Steven Koster made admissions that she was not its employee as they knew her medical bills were being paid for by health insurance and not by ERM's workers' compensation carrier:

Q Did you ever talk to Mr. Van Til about an offer of money to resolve Ms. Van Til's claims?
A Yes, we did.
MR. COOPER: And the court reporter should note a continuing objection.
MR. WUORI: I don't have any problem with a continuing objection to this line of questioning for Mr. Cooper.

00054
Q When did that occur?
A I don't know the date.
Q How much money did you offer?
A I don't recall specifically. It was, I believe between $10,000 and $20,000. I don't recall the exact figure.
Q Were you at ERM when you were having this discussion with Mr. Van Til?
A You mean located here in this office?
Q Yes.
A Yes.
Q Who else was prevent?
A Mr. Dell.
Q Was it at his workstation or was it at one of your offices?
A It was in one of our offices, yes.
Q Who was it that made the specific offer, you or Mr. Dell?
A Mr. Dell did.
Q Ms. Van Til wasn't present, correct?
A That's correct.
Q Was the offer of the $10,000 to $20,000 for Ms. Van Til's accident including an assessment of wage loss and pain and suffering?
A I believe we were considering her wage loss and

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possible unpaid medical expenses that were not covered by health insurance.
Q And you've never directly spoke with Ms. Van Til, correct?
A That's correct.
Q And Mr. Dell hasn't spoke to Ms. Van Til, to your knowledge, correct?
A To my knowledge, he hasn't. The understanding was that those discussions would be relayed to Ms. Van Til

10 by Mr. Van Til.
11 Q That was your understanding, correct?
12 A Yes.
13 Q To your knowledge, Ms. Van Til didn't have any
14 knowledge of what you were doing, correct, talking
15 with Mr. Van Til about any of this?

Deposition of Steven Koster, pgs. 53-55 *(Appendix 241a-243a)*. Marcia never received any payment from ERM. Affidavit of Marcia Van Til, ¶ 9 *(Appendix 254a)*.

B. Court Proceedings

This negligence lawsuit was filed on March 11, 2002. The Defendant-Appellee filed its Answer on May 9, 2002 and raised the affirmative defense of the exclusive remedy provision of the WCDA/subject matter jurisdiction.

On February 11, 2003, Defendant filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(4) *(Appendix 281a)* alleging that the undisputed facts demonstrated that the trial court lacked subject matter jurisdiction of Plaintiff-Appellant's claims because the Workers' Disability Compensation Act provided an exclusive remedy precluding a tort claim. See MCL 418.161 *(Appendix 260a)* (employee analysis) and MCL 418.131 (exclusive remedy provision) *(Appendix 259a)*. Plaintiff then filed a Response to Defendant's Motion for Summary Disposition and a Cross Motion for Summary Disposition and supporting brief and exhibits on March 10, 2003 arguing that there were no issues of fact and that Marcia Van Til was a volunteer not subject to the WDCA. Defendant submitted a Supplemental and Reply Brief in Support of Defendant's Motion for Summary Disposition and in Opposition to Plaintiff's Cross-Motion for Summary Disposition on March 28, 2003.

The motions were scheduled and oral argument heard on April 7, 2003 *(Appendix 1a)*. Following oral argument, the trial court issued an Order and Opinion

dated June 2, 2003, denying Defendant's Motion for Summary Disposition and granting Plaintiff's Cross-Motion for Summary Disposition *(Appendix 17a)*.

On June 12, 2003, Defendant filed a Motion for Reconsideration of the Court's Denial of its Motion for Summary Disposition, stating that the trial court's Opinion and Order dated June 2, 2003, constituted palpable error by failing to address the statutory employer issue. In a subsequent Opinion and Order by the trial court dated July 18, 2003 *(Appendix 22a)*, it reversed the June 2, 2003 Opinion and Order and granted summary disposition for Defendant ERM based upon MCL 418.171 (statutory employer) *(Appendix 265a)*.

On August 1, 2003, Plaintiff filed a Motion for Reconsideration and Rehearing of the July 18, 2003 Opinion and Order with supporting brief and exhibits. On August 8, 2003, the trial court issued another Opinion and Order denying Plaintiff's Motion for Reconsideration *(Appendix 29a)*. Subsequently, an order was entered on August 22, 2003 declaring that the August 8th Opinion and Order was, in fact, a final order and effectively closed the case *(Appendix 30a)*.

The trial court found, in both its original Opinion and Order granting Plaintiff's Cross-Motion for Summary Disposition and denying Defendant's Motion for Summary Disposition and in the order granting reconsideration and reversing its prior order, (1) "Plaintiff never received any payment from the defendant for her work. Affidavit of Marcia [sic] Van Til, ¶ 9 *(Appendix 254a)*. Therefore, she did not declare any income from the defendant on her tax return for 2001." June 2, 2003 Opinion and Order, pg. 2 *(Appendix 18a)*; (2) "In the case at bar, the facts conclusively show that plaintiff did not receive any payment intended as wages from the defendant. Mr. Van Til was the only

person who received payment intended as wages. This Court holds as a matter of law that plaintiff was not an employee of the defendant [under §161]. Instead, plaintiff was a "gratuitous worker. . . an individual assisting another. . . ." *Hoste, supra.*

> " . . .the objective facts show that Mr. Van Til was the only one who received any compensation for stripping the floor of the mailroom. Mr. Van Til turned in 13 hours on his time card. Mr. Van Til was paid for 13 hours of work. There is no evidence whatsoever that either Mr. Van Til or the defendant ever paid any money to the plaintiff for her work. And there is clear evidence to the contrary: plaintiff stated in her affidavit that she never received any payment for the five hours that she worked. Therefore, there is no genuine dispute that plaintiff was a "gratuitous worker . . . an individual assisting another . . . " *Hoste, supra,* p 578."
> July 18, 2003 trial court Opinion and Order, pgs. 3-4 *(Appendix 24a-25a)*.

Despite these factual findings, ERM argued in its Motion for Reconsideration (to which the Plaintiff-Appellant had no right to respond by court rule), and the trial court agreed, that: "Defendant argues that the statutory employer doctrine applies in the case at bar because defendant is a "principal," Mr. Van Til is a "contractor," and the injury occurred during the execution of a "contract of work" undertaken by the principal." July 18, 2003 Opinion and Order, pg. 5 *(Appendix 26a)*.

An appeal by right followed to the Michigan Court of Appeals, which affirmed the trial court's ruling, but on other grounds. The Court of Appeals reversed the trial court's finding that Marcia was not an employee but was a gratuitous worker and did not address the "statutory employer issue," finding it moot.

This Court granted leave and raised the jurisdictional issue as well.

SUMMARY OF THE ARGUMENT

The circuit courts share concurrent jurisdiction with the Workers' Disability Compensation Bureau (WDCB) to determine whether a tort victim is an employee. The Michigan Constitution, along with the Revised Judicature Act, makes it clear that without

an express mandate or prohibition to the contrary, the circuit courts cannot be divested of their broad grant of jurisdiction. A reading of the worker's compensation statute (MCL 418.841(1)) *(Appendix 269a)* providing some "exclusive" jurisdiction to the WDCB does not deny the circuit court of jurisdiction. The Michigan Constitution confers plenary jurisdiction on the courts—with the circuit court having original jurisdiction in all matters not prohibited by law. The Revised Judicature Act ("RJA"), provides that some other courts have jurisdiction (i.e. probate, district, but not agencies). Courts determine their own jurisdictions, and if there is not some provision that expressly denies that jurisdiction, it can be exercised.

There is also no need for this Court to resort to any form of statutory construction, as the plain language of the statute leaves nothing open to interpretation by this Court. Certainly, had the Legislature intended that the WDCB have exclusive jurisdiction, especially to the exclusion of a court, it would have had no problem including the express language required by the Michigan Constitution and the RJA. As such, this Court correctly decided *Sewell v Clearing Machine Corp.,* 419 Mich 56; 347 NW2d 447 (1984), as the decision is consistent with the jurisdiction granted circuit courts by the Michigan Constitution and the Revised Judicature Act.

The facts of this case applied to the test set forth by this Court in *Hoste* show that the Michigan Court of Appeals erred in reversing the trial court's ruling that there was no issue of fact that Marcia was not an employee of ERM. Marcia Van Til cannot legally be deemed an employee because there was no contractual relationship, either express or implied, between Marcia and ERM. Although there was a contractual relationship between Byron, Marcia's husband, and ERM, Byron did not have the authority to hire

Marcia as an employee. In fact, ERM rejected the idea of hiring Marcia to help her husband with his janitorial duty of stripping and waxing its floors. As such, there was no expectation of payment from Marcia nor did ERM expect to make payment intended as wages to Marcia, and it did not. All that was expected was that Byron would get paid for his normal job.

Additionally, there was nothing exchanged between Marcia and ERM sufficient to meet the "of hire" requirement in the *Hoste* test. Marcia volunteered to help her husband knowing that she would not be paid. Although ERM paid Byron for the job that was completed, it did not receive any additional benefit from Marcia volunteering to help her husband. This job was part of Byron's normal job duties and would have been done by Byron irrespective of his wife's help. Clearly, these facts are not sufficient to equate to something real, palpable or substantial enough for Marcia to give up her right to sue, nor did ERM expect as much. Factually that is clear, which is consistent with the language and intent of *Hoste*. Otherwise, ERM would not have offered to settle Marcia's claims, but instead would have filed a notice with their workmen's compensation carrier. Thus, the Court of Appeals erred when it reversed the trial court's ruling that Marcia Van Til was not an employee of ERM.

Defendant-Appellant's argument that ERM is the statutory employer of Marcia is wholly inconsistent with the statutory scheme and the goals for enacting the statute. This statute was enacted specifically to ensure that employees of uninsured contractors who were injured on the job were compensated for his or her injuries. There is no contractor/subcontractor relationship between any of the parties nor is there an employee who worked for an uninsured contractor in this case. Marcia was injured

while helping her husband, not her employer. Byron is ERM's employee, not its subcontractor. The facts of this case simply cannot be stretched into the facts required to make ERM the statutory employer of Marcia. As such, the trial court erred in holding that ERM is the statutory employer of Marcia.

ARGUMENT

I. THE WORKERS' COMPENSATION STATUTE DOES NOT PROHIBIT THE JURISDICTION OF CIRCUIT COURTS TO HEAR A TORT CLAIM WHERE THE DEFENSE ASSERTS AN EMPLOYER/EMPOYEE RELATIONSHIP

Plaintiff-Appellant sought Application for Leave of this Court based on the Court of Appeals' decision that Marcia was an employee of ERM. Court of Appeals' Unpublished Decision dated February 10, 2005 *(Appendix 187a-191a)*. In granting Marcia's Application for Leave to Appeal, this Court specifically requested that the parties brief "whether the trial court has jurisdiction to determine whether Plaintiff was an employee, or whether that question must first be resolved in the worker's compensation adjudicatory system" in light of this Court's recent decision in *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005) and *Sewell v Clearing Machine Corp.*, 419 Mich 56; 347 NW2d 447 (1984). Order granting Plaintiff-Appellant's Application for Leave to Appeal on November 3, 2005 *(Appendix 218a)*. Specifically, the issue presented in *Reed* was whether the previous decision of this Court in *Sewell* was wrongly decided.

In *Sewell*, the plaintiff was injured in an industrial accident and brought suit against a corporation that plaintiff alleged "assumed control of his employer's safety program and other operations." Id. at 58. The issue was "whether in an action in circuit court seeking damages for personal injury, the circuit court has jurisdiction to decide

whether the defendant is the plaintiff's employer and thus invoke the exclusive remedy provision of the Worker's Disability Compensation Act." *Id.* at 57. Ultimately, this Court held that the circuit courts and the Worker's Disability Compensation Bureau (WDCB) share concurrent jurisdiction to determine the initial inquiry of whether an injured person is an employee. *Id.* at 62.

In reaching the ruling in *Sewell,* this Court distinguished its prior decision in *Szydlowski v. General Motors Corp.*, 397 Mich 356; 245 NW2d 26 (1976) from which the Court of Appeals relied in remanding the case to the WDCB. In *Szydlowski*, the employee had filed two different claims in the WDCB, both of which were dismissed for lack of progress. *Id.* at 357. The employee then filed a wrongful death suit in the circuit court which alleged that the employer violated its statutory duty to provide reasonable medical services. *Id.* In *Szydlowski*, the issue was whether the plaintiff's injury arose in the course of employment. *Id.* This Court held that because the issue of whether plaintiff employee was in the scope of employment it "concerned matters for the Worker's Compensation Bureau, not for the circuit court" and sent it back to the bureau *Id.* at 358.

Szydlowski is an easy case because the complaint itself alleged the employment relationship and WDCA benefits: "This claim is based upon a section of the compensation act." *Id.* at 358. At the other end of the spectrum is the instant case, a tort suit in which the employment relationship and compensation benefits were neither pled nor sought.

In relying on the prior decision of this Court in *Szydlowski*, the Court of Appeals in *Sewell* similarly held that the issue of the injured plaintiff's employment status should

be sent back to the WDCB and that the civil action should be held in abeyance until a determination was made by the WDCB. In reversing the Court of Appeals decision in *Sewell*, this Court explained:

> Properly stated, the *Szydlowski* principle is that the bureau has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment. The Courts, however, retain the power to decide the more fundamental issue whether the plaintiff is an employee (or fellow employee) of the defended.

Id. at 62.

The issues presented in *Szydlowski* and *Sewell* are separate and distinct. In *Szydlowski*, there was no question as to whether the plaintiff was an employee; plaintiff was again alleging the employment relationship and WDCA benefits. *Sewell*, however, concerned the issue of whether the injured plaintiff was an employee of defendant. The fundamental difference is that where there is no question of employment status, or where the plaintiff is claiming employment status and benefits, the issue is clearly one for the WDCB. However, where there is merely a defense asserted that the injured tort plaintiff is an employee, that is a matter that may, and should, be decided by the circuit courts because it goes to the merits of the injured plaintiff's tort claim. Circuit courts have jurisdiction to decide tort cases. This is the fundamental issue that determines whether the injured plaintiff's claim is one that lies in tort or under the WDCA.

Since *Sewell*, there have been cases in which the Bureau and the circuit courts worked in tandem. When a worker claimed employment status and sought benefits from the Bureau (as it was and should have been in *Szydlowski*), the Bureau decided whether there was the employment relationship. When a plaintiff sued in civil courts, and the defendant raised employment as a defense, the civil courts at times decided the

issue. Recently, however, the court decided *Reed v. Yackell*, 472 Mich 520; 703 NW2d 1 (2005). In *Reed*, the worker was an occasional worker and was paid "under the table." He was injured while working and sued for damages. The defendant raised the exclusive remedy provision as a defense, creating the employment issue. The trial court ruled for the plaintiff and the defendant appealed. The Supreme Court invited amicus briefs but declined to rule on the issue.

The decision of this Court in *Sewell* was correctly decided in that the circuit court has the power to determine the fundamental issue of whether an injured plaintiff in a tort case is an employee based not only on the broad grant of original jurisdiction by the Michigan Constitution, but also the lack of a clear mandate in MCL 418.841(1) *(Appendix 269a)* that prohibits the circuit courts subject matter jurisdiction.

A. The Power of the Circuit Court—or its Subject Matter Jurisdiction—Is Broadly Granted by the Constitution

To determine whether the circuit court has concurrent jurisdiction with the Worker's Disability Compensation Bureau ("WDCB") to decide an injured party's employment status, one must first look at the authority granted to the circuit courts by the Michigan Constitution, which provides:

> The circuit court shall have original jurisdiction in **all matters not prohibited by law**; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdiction in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by the rules of the supreme court.

Const., 1963, art. 6, § 13 (emphasis added) *(Appendix 296a)*.

Moreover, according to MCL 600.601 and MCL 600.605:

> The circuit court has the power and jurisdiction. . .possessed by courts of record at the common law, as altered by the state constitution of 1963, the laws of this state and the supreme court.
>
> Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court, or where the circuit courts are denied jurisdiction by the statutes of this state.

(emphasis added) *(Appendix 271a-275a)*. No other "court" has been given exclusive jurisdiction on this issue; and the circuit courts have not been "denied" jurisdiction by statute.

Circuit courts are presumed to have subject matter jurisdiction "unless **expressly** prohibited or given to another court by virtue of the constitution or statute." *In re Wayne County Treasurer*, 265 Mich App 285, 291 *app'l den.*, 474 Mich 862 (2005) (citing *Bowie v Arder*, 441 Mich 23, 38 (1992) (emphasis added). The circuit courts possess broad original jurisdiction over all matters, civil matters in particular, unless explicitly ***prohibited*** by law. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 375-376; 689 NW2d 145 (2004) (emphasis added)). "Prohibit" is defined as "to forbid by law; to prevent." *Black's Law Dictionary,* (5th ed. 1979). There is nothing in the Michigan Constitution or Worker's Compensation Disability Act that *expressly* prohibits or forbids by law the circuit court from exercising jurisdiction over tort claims that involve the defense issue of whether an injured person is an employee or that such issue must first go to the WDCB for such determination before any tort claim is allowed to proceed in the circuit court.

It is also important to point out that this Court has held that divestiture of jurisdiction is a "very serious matter and cannot be done except under clear mandate of law." *Leo v Atlas Industries, Inc.,* 370 Mich 400, 402; 121 NW2d 926 (1963). Any

statute that purports to divest jurisdiction from circuit courts are to be strictly construed and every doubt is resolved in favor of retention rather than divestiture of jurisdiction. *See Wikman v City of Novi*, 413 Mich 617, 644-45; 322 NW2d 103 (1982); *Paley v Coca-Cola Co.*, 389 Mich 583, 592; 209 NW2d 232 (1973). There is also a presumption against divestiture of jurisdiction from a court to a lower court. *Paley*, 398 Mich at 593. In discussing whether to divest a circuit court of jurisdiction, this Court has stated:

> In dealing with statutes intended to affect or claimed to affect the continuance of jurisdiction in courts of original and general authority (such as circuit court) the law has always recognized a principle of construction which served to favor the retention of jurisdiction. . .the language of an act designed to divest that court of its jurisdiction over the proceedings of inferior tribunals **must express the intent with such clearness as to leave no room for doubt**. **Indeed, the authorities are very numerous and striking, that before it can be claimed that an act is to have the effect to absolutely divest a jurisdiction which has regularly and fully vested, the law in favor of it must be clear and unambiguous**. . .
>
> 'Whatever presumptions are permitted are in favor of the retention of the authority, . . .; **and it is very natural and reasonable to suppose that the legislature in so far as they should think it needful to authorize interpretations and the shiftings of jurisdiction, would express themselves with clearness and leave nothing for the play of doubt and uncertainty**.'

Id. at 593 (quoting *Crane v Reeder*, 28 Mich 527, 532-33 (1874) (emphasis added)). That level of obvious clarity is surely lacking given what courts have done over the years.

What this Court would be doing if it overruled *Sewell* is completely divesting the circuit courts jurisdiction over tort claims that contain the issue of whether an injured party is an employee to an agency without a clear and express mandate of law that leaves "nothing for the play of doubt or uncertainty." For that reason alone, *Sewell* was not wrongly decided as any ruling to the contrary would be inconsistent with the

Michigan Constitution and the rules of construction applicable to divesting a court of its jurisdiction. Without a clear and express intent by the Legislature, which does not exist in the WDCA (or elsewhere for that matter), this Court should not deny the circuit court of its power to hear tort claims that involve issues of whether an injured plaintiff may be an employee or subject to the Act.

It is clear based on the constitutional grant of authority to the circuit courts that unless and until there is a clear mandate to the contrary, a circuit court is presumed to have subject matter jurisdiction in tort claims even where there may be an issue of whether an injured plaintiff is an employee of the defendant. Even if the wording of the worker's compensation statute raised a doubt or question as to the circuit courts' jurisdiction (which it does not), that matter is to be decided in favor of retaining jurisdiction in the circuit courts, not divesting it. Thus, the Michigan Constitution, the RJA, and well-recognized principles of statutory construction lead to the conclusion that the circuit court had and has jurisdiction in this case. There is no explicit or express mandate or prohibition in the WDCA to divest the circuit courts of jurisdiction over tort claims in which a defendant asserts a defense of an employer-employee relationship.

A court determines its own jurisdiction. *Haywood v. Johnson,* 41 Mich 598, 606; 1 NW 926 (1879). As shown above, jurisdiction over common law or statutory tort claims rests with the courts, unless there is some other authority expressly and properly showing otherwise.

The presumptive argument in favor of overruling *Sewell* and that there is such authority stems presumably from the legislative language in the WDCA, by which the

legislature arguably chose to "prohibit" and "deny" the circuit court of jurisdiction by "exclusively" giving it to the Bureau. That language does not support the conclusion.

B. The Worker's Compensation Statute Does not Prohibit the Circuit Court's Subject Matter Jurisdiction

The statute at issue that grants "exclusive" jurisdiction to the Worker's Disability Compensation Bureau to determine the employment status of an injured plaintiff is MCL 418.841(1) *(Appendix 269a)*, which provides:

> Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable.

The rules of statutory construction are well established. This Court has held with regard to statutory construction:

> The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the legislature. . .The words of a statute provide the most reliable evidence of its intent. . .If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. . .Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.

Sun Valley Foods Co. v Ward, 460 Mich 230, 236; 596 NW2d 119 (1999).

Similarly, in *People v McIntyre*, 461 Mich 147, 152-153; 599 NW2d 102 (1999), (quoting from Justice Young's dissenting opinion), it was stated:

> A fundamental principal of statutory construction is that 'a clear and unambiguous statute leaves no room for judicial construction or interpretation.' . . . When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for juridical construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case.

Nowhere in the statutory scheme of the Worker's Compensation Disability Act does it state that the Worker's Disability Compensation Bureau has "exclusive jurisdiction" to determine the issue of an injured party's employment status in a tort claim. The statute specifically provides that the bureau has, at best, jurisdiction to hear "any dispute or controversy ***concerning compensation or other benefits***" and "***all questions arising under this act . .*** [concerning compensation or other benefits]."

A civil suit for tort damages is not a "dispute or controversy concerning compensation or other benefits." *Szydlowski* clearly fell within that jurisdiction. This case is not. This first part of the statutory sentence defines and limits the second half of the sentence and they must be read together. Statutes must be interpreted as a whole, and one section of a statute should be read as part of its whole. Every word has some meaning and courts should avoid a construction that would render parts of a statute surplusage. *Hoste*, *supra.* Reading the "all questions arising" language broadly enough to include the determination of employment relationship makes the first part of the sentence surplusage. This case is not a dispute concerning compensation or benefits and there is no question relating to those benefits.

Moreover, even if the language supports a grant of jurisdiction to the Bureau, that same language does not prohibit or deny jurisdiction elsewhere. The legislature knows how to "prohibit" or "deny" jurisdiction. One phrase from the WCDA statutory language does not lead to the removal of jurisdiction from the circuit court granted by law.

Whether this is a case that ***concerns*** compensation or other worker's compensation benefits or ***arises under*** the Worker's Disability Compensation Act cannot be determined unless and until the injured plaintiff is determined to be an

employee. As counsel for plaintiff correctly argued at oral argument in *Reed*, before any decisions can be made with respect to the "concerning compensation or other benefits" or "arising under this act" a determination must first be made whether the cause of action is in tort or worker's compensation. It is not until after such a determination is made in the affirmative that the language of MCL 418.841(1) *(Appendix 269a)* makes it clear that the WDCA is implicated.

It is the Act, itself, that supports the proposition that it (the Act) is only implicated where a person is an employee. Specifically, in defining the persons that are subject to the Act, MCL 418.111 *(Appendix 256a)* provides:

> Every employer, public or private, and every **employee**, unless herein otherwise specifically provided, shall be subject to the provisions of this act and shall be bound thereby.

Even the statute providing for the exclusive remedy under this Act demonstrates that it does not even become relevant until the person is deemed an employee because if you are not an employee, such person is **not** subject to the Act:

> (1) The right to recovery of benefits as provided in this act shall be **the employee's** exclusive remedy against the employer for a personal injury or occupational disease. . .

MCL 418.131(1) *(Appendix 259a)*.

Given the unequivocal language of the Act and the well recognized principles of construction outlined above, the Act does not even come into play unless and until a person is deemed an employee because it only applies to employees, not alleged employees. Further, the WDCA certainly does not contain the requisite language that provides the clearness that "leaves no room for doubt," which the Legislature is required

to have in the statute before denying the circuit courts of their subject matter jurisdiction to heart tort claims in which the defense asserts some form of employment status.

There is also nothing in the plain and unambiguous language of MCL 418.841(1) *(Appendix 269a)* that prohibits the circuit court from deciding the merits of a tort claim, i.e. whether a defendant's defense that the injured party is an employee precludes the case from going forward. Without question, the WDCB does not have jurisdiction to decide whether a plaintiff has established a prima facie tort claim. The specific language or wording of MCL 418.841(1) *(Appendix 269a)* is all one needs to look at to know that the WDCB's jurisdiction is limited to matters that are "***concerning compensation or other benefits***" and "***arising under this act***." The Legislature could have very easily worded this statute differently if its intent was to completely divest the circuit courts from hearing any matter that brushes against the issue of employment status by explicitly stating so. It did not nor does the wording in the statute reflect such intent on the part of the Legislature. It would require an improper and narrow reading of the WDCA, when compared to the constitutional and RJA jurisdictional language, to conclude that the WDCB and only the WDCB has exclusive jurisdiction to hear any and all claims that concern employment status.

To hold that this worker's compensations statute--MCL 418.841(1) *(Appendix 269a)*—divests the circuits courts of subject matter jurisdiction to determine whether a tort victim is an employee would also require this Court to read language into the statute's clear and unambiguous language. This Court is precluded from making such an interpretation as it is "bound by oath to give meaning to every word, phrase, and clause in the statute." *Reed*, 473 Mich at 537. It is only where the statute is

ambiguous that a court is allowed to go beyond its words to ascertain the Legislative intent.

As stated above, where there is doubt, the presumption is in favor of retaining jurisdiction, not divesting it. However, there is no doubt that this statute does not provide for the clear mandate required by the Michigan Constitution to divest circuit courts from making rulings in tort claims where there is a mention or allegation by the defendant that there is an employer-employee relationship. The circuit courts have established rules for deciding such issues, e.g. Michigan Court Rules, Michigan Rules of Evidence, discovery, motions for summary disposition, etc. Whether the plaintiff in a tort action makes out a prima facie case against a defendant is rightfully decided by the circuit court, not the WDCB.

C. The Stare Decisis Considerations Will Not be Satisfied if *Sewell* is Overruled

Before even considering whether to overrule a prior decision of this Court, the first question that must be addressed is whether the earlier decision was wrongly decided. *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). Based on the constitutional grant of power given to the circuit courts in the Michigan Constitution and the requirement that it have original jurisdiction in all matters, particularly civil, "***not prohibited by law***," *Sewell* was not wrongly decided. Even if the Worker's Disability Compensation Act sheds some doubt as to whether the circuit court has concurrent jurisdiction, which it does not, this Court should not strip the circuit court's jurisdiction without a clear mandate of law to that effect.

Even if this Court determined that *Sewell* was wrongly decided, that does not necessarily mean it should be overruled. *Id.* at 466. "Rather, the Court must proceed

on to examine the effects of overruling, including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of that reliance." *Id.* With regard to the reliance interest, the Court must ask itself "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would product not just readjustments, but practical real world dislocations." *Id.*

The case law holding that a circuit court has jurisdiction to determine the initial inquiry of whether an injured party is an employee of a defendant in a tort action dates back to at least 1979. *See Nichol v Billot*, 406 Mich 284; 279 NW2d 761 (1979). There are also many others cases that have made similar rulings. *See, e.g., Fletcher v Harafajee*, 100 Mich App 440; 299 NW2d 53 (1980); *Cole v Dow Chemical Co.,* 112 Mich App 198; 315 NW2d 565 (1982); *Farrell v Dearborn Mfg. Co.,* 416 Mich 267; 330 NW2d 397 (1982). These cases do not even take into account the numerous decisions that have held that the circuit court has jurisdiction in cases where "it is obvious that the employment relationship does not relate to the cause of action" or where "the employment relationship is only incidentally involved." *See Bednarski v General Motors Corp.,* 88 Mich App 482; 276 NW2d 624 (1979); *Dixon v Sype*, 92 Mich App 144; 284 NW2d 514 (1979); *Buschbacher v Great Lakes Steel Corp.,* 114 Mich App 833; 319 NW2d 691 (1982); *Houghtaling v Chapman*, 119 Mich App 828; 372 NW2d 375 (1982). The existence of concurrent jurisdiction between the circuit courts and the WDCB has been followed. It is workable. It will be more practical for this Court to confirm concurrent jurisdiction and to give trial courts the discretion to proceed or defer.

Longstanding policy, practice and legal precedent in Michigan establish the power and propriety of the circuit courts to hear tort claims, and to determine pendant and necessarily "collateral" issues. As discussed above, the power of the circuit court to hear tort claims begins with the Michigan Constitution of 1963 and is confirmed in the Revised Judicature Act.

The combined years of legal authority and precedent create a tightly woven fabric of jurisprudence which serves the ends of fairness, predictability, and effective resolution of these civil disputes. Long established public policy in Michigan, as declared in these authorities and precedent, favors retention of jurisdiction in our circuit courts. Divestiture of complete jurisdiction to the Bureau is not supported.

As was noted in *Reed*, precedent should not be overruled lightly and reading meaning into a statute that is not explicitly provided therein (inferring prohibition of subject matter jurisdiction and divestiture of power) is impermissible. Interpreting the WDCA to divest portions of subject matter jurisdiction in tort claims from circuit courts could lead to lengthy and complicated litigation in both forums. In many cases, a lawsuit may have to be filed to comply with a statute of limitations, or claims will be brought against co-defendants who then blame the "employer." These cases could be on hold for years while an employment determination is made in the Bureau.

Answers to tort complaints, in practice, raise every conceivable affirmative defense. Predictably, if there is any reference to an employment status, the case would then have to stop or be stayed if *Sewell* is overruled. When can a complaint be filed in the circuit court if the statute of limitations is to expire and the issue is still within the

Bureau or on appeal? The trial court could do nothing once the issue is raised as a defense, not even if the claim was baseless.

Under the strained interpretation of the worker's compensation statute advocated to deny the circuit courts subject matter jurisdiction, such pleading by the defense will force the circuit court to stay the lawsuit and refer the entire issue to the bureau; wherein a long road of determinations and appeals will be undertaken causing prejudice to the parties and making a growing backlog of stayed lawsuits, especially involving other defendants. Some may argue that the case should be dismissed with the plaintiff to face a statute of limitations defense years later if the Bureau process is not timely (and when witnesses, evidence may be gone).

The mere allegation by a party that a portion of a claim or defense involves an employment relationship issue will require the proverbial process to stop, and a referral to the bureau of a part of the litigation if the circuit courts cannot rule on the correctness of the allegations. The circuit courts are equipped with the means by which it can, and is expected by litigants, to address the issue. The court rules provide the methodology by which the Court is to determine whether a tort lawsuit should be dismissed or, a portion of it referred to the bureau. These can be on a case-by-case basis.

The circuit courts must have subject matter jurisdiction to determine whether a basis for jurisdiction in the WDCB exists, on a fully developed record and according to accepted and expected fair procedural methods. In doing so, the court is free to consider legal and equitable concepts that apply to whether an employment relationship exists in the first place—ideas of express and implied contract, evidence of expectations of the parties, and application of law to developed fact. Unless there is an employment

relationship, no issue concerning benefits or compensation under the act can exist or be ripe for the bureau to decide.

What proponents of the overbroad reading of the Act would create is a complicated system that piecemeals the circuit courts' jurisdiction and cases pending before it; all the while creating lengthy delays and unfair prejudice to some parties while creating unfair tactical advantage to others. Only if the circuit courts find the existence of an employer-employee relationship should a tort claimant have his or her cause of action remanded from the court.

By analogy, in federal court, there can be diversity of citizenship jurisdiction under federal statute. The allegations of diversity factually may or may not be disputed, and may or may not be the subject of appeal and a subsequent finding of jurisdiction or lack of jurisdiction. In that context, there is authority for the determination to be made based on the situation existing at the time of the filing of the complaint. See e.g., *Restaco, Inc. v. AMI Reichert, LLC*, 356 F. Supp. 2d 835 (N.D. Ohio (2005)). In the instant case, the factual record shows that prior to and at the time of the complaint neither Marcia Van Til nor ERM viewed Marcia Van Til as an employee. Marcia never has viewed herself as an employee, and ERM clearly stated that it did not want to hire her. There was no statutorily-required report of injury filed, there was an offer of settlement on a tort claim, including acknowledgment of part of the settlement to pay medical expenses above that not covered by Marcia's health insurance. At the time of the filing of the Complaint, the facts were such that why would anything be filed in the Workers' Compensation Bureau? And ERM was content to proceed with discovery rather than seek a remand or referral immediately.

In addition, in *In re Hatcher*, 443 Mich 426, 505 NW2d 834 (1993), this Court discussed probate court jurisdiction. In that case, this Court ruled that "a court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *Id.* at 444. As explained in this brief, the circuit court has jurisdiction to decide tort cases and Marcia's claim is not frivolous. However, a frivolous defense of a claimed employment relationship if *Sewell* is overturned could not be determined by the trial court. And what should or can a party do with other claims against other co-defendants in the circuit court, which may be delayed or result in two trials, and more appeals? Counsel has that exact situation in a pending circuit court case with multiple plaintiffs and multiple defendants. Rather than have one trial, and one appeal, with all claims and issues, there is this: a delayed Bureau decision on employment issues with certain appeals, while the trial proceeds against other defendants (and against the "employer" defendant by other plaintiffs), with probable appeals. If the Bureau determines that the WDCA does not apply, the tort claim against that Defendant (also part of the first trial) will go to trial years from now with likely appeals. Had the circuit court not had the *Reed* question, it could have made that case less lengthy and costly for all involved.

Michigan Court Rule 1.105 *(Appendix 275a)* states that the "rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." By forcing all litigants, with any tangential relationship to go before the WDCB, and Plaintiff in this particular case to argue against the application or applicability or jurisdiction of that agency, will lead to circuit court filings in any event, especially when

the time of an initial Bureau determination, and possible appeals all the way to this court, may create a statute of limitations problem such that a circuit court action will have to be filed to preserve a circuit court claim in the event that a court rules the WDCA does not apply.

Concurrent jurisdiction is both warranted and appropriate given the wide variety of factual circumstances that may be present. Otherwise, as in this case, you would have a party filing an action in the Bureau to make a determination, in part or in effect, that the circuit court has jurisdiction. And if there are other claims against other parties, you may also may have circuit court claims, including notices of non-party fault against the putative "employer," from which that circuit court action may have to be stayed if the "employer" is sought to be added to the litigation (or create some difficult issues regarding the application of MCR 2.112(K) *(Appendix 280a)* in the absence of a definitive ruling regarding whether a tort claim could be brought against that putative employer). From experience, plaintiffs and defendants desire quick resolutions of matters, not multiple trials and appeals. The circuit court is in the better position to evaluate this issue consistent with MCR 1.105 *(Appendix 276a)* as to whether it should decide the issue or the Bureau in the first instance.

If the argument or conclusion is that the WDCA denies jurisdiction to the civil courts, it will be a new rule. *Szydlowski*, for example, was a case in which the plaintiff alleged the employment relationship and the failure to provide the statutory benefit of medical services. In the instant case, there was no reason to go to the WDCB. The employment relationship and WDCA benefits were not alleged, and bureau jurisdiction would be based upon the defendant's allegation of the employment relationship as a

defense. Any time, no matter what type of case, no matter what is at issue factually, any time the WDCA is raised a trial court cannot rule on the matter but must essentially refer the issue to the Bureau while staying the civil action (and arguably claims of other litigants if there is more than one defendant if *Sewell* is overturned).

The Bureau will then make its decision with the putative tort claimant arguing against the employment relationship and the putative employer arguing for it. That ruling will be subject to further appellate review, including in the court of appeals and the Supreme Court. The trial court will then re-activate the case or dismiss it as to that defendant. That may work simply in some cases, but create real problems in others (multiple party cases).

These issues have been resolved by the Bureau determining its jurisdiction when cases are filed with it; and the trial court determining its own jurisdiction when cases are filed with it. This procedure is proper in both venues. The statutory language in the WDCA does not preclude or prohibit the exercise of the jurisdiction of the circuit court given to it by the constitution and the Revised Judicature Act.

The Plaintiff-Appellant is unaware of "less mischief" resulting from overruling *Sewell* rather than following it. *Robinson v. City of Detroit*, 462 Mich 439, 471; 613 NW2d 307 (2000). And "more mischief" may result by undoing that which has been occurring in the courts and the Bureau since then. Defendant-Appellee could have sought a stay and remand to the Bureau earlier in the case, but was presumably comfortable with the procedure followed. Ultimately, the issue can reach an appellate court by either approach. There are cases involving multiple parties, anticipated non-party at fault notices, in which there will be circuit court claims involving litigants other

than the putative employer or viable claims notwithstanding the employment relationship. See, e.g. *Bitar v. Wakim,* 456 Mich 428; 572 NW2d 191 (1998), a situation that reoccurs as noted above. While unaware of the average length of decisions through the Bureau and appeals, the delay is significant (and not just to plaintiffs, as defendants also desire quick finality), especially if the tort suit is then allowed.

II. THE COURT OF APPEALS MISAPPLIED THE *HOSTE* TEST IN REVERSING THE TRIAL COURT'S RULING THAT MARCIA WAS A VOLUNTEER/GRATUITOUS HELPER, WITH NO CONTRACT OF HIRE AND RECEIVING NO PAYMENT INTENDED AS WAGES FROM DEFENDANT-APPELLEE UNDER MCL 418.161 AND IS THUS NOT BARRED FROM BRINGING A NEGLIGENCE ACTION

The Court of Appeals misapplied the *Hoste* test to the facts of this case and erred in reversing the trial court's ruling that Marcia was not an employee, but a gratuitous worker that was not under any contract of hire, express or implied, and who received no payment intended as wages from ERM. In *Hoste*, the Supreme Court held that a trial court must consider two sections of the statute to determine whether a person is an employee or not. Id. at 571. The test, as outline in *Hoste*, provides:

> . . . [A] proper reading of " § 161(1) requires that an individual's situation must be examined in respect to both the entity they are associated with [§ 161(1)(b)] [now § 161 (1)(l)] and the particular characteristics of that association [§ 161(1)(d)] [now § 161 (1)(n)].". . . .
>
> . . . .
>
> The first test then is whether plaintiff was an employee under § 161(1)(b) [now §161 (1)(l)]. If he is, then he must also pass muster under § 161(1)(d) [now § 161 (1)(n)].
>
> Section 161(1)(b) [now § 161 (1)(n)] involves an inquiry regarding whether plaintiff was an employee under a "contract of hire." . . .
>
> . . . .
>
> . . . Fundamental principles of worker's compensation indicate that the words connote payment of some kind. . . .
>
> These basic precepts of worker's compensation show that in order to receive benefits under the WDCA, it is not enough for an individual to be employed pursuant to a "contract"; rather, the individual must be

> employed pursuant to a contract "of hire," where the benefit received by the individual is payment intended as wages. . . .
>
> . . . .
>
> **. . . Accordingly, to satisfy the "of hire" requirement, compensation must be payment intended as wages, i.e., real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer. . . .**

Id., pgs. 571-575 (emphasis added).

Because the facts of this case conclusively show that Marcia was not an employee under MCL 418.161(1)(l) *(Appendix 262a)*, it is not necessary to determine whether Marcia was an independent contractor under MCL 418.161(1)(n) *(Appendix 262a)*.

A. Marcia Was Not in the Service of ERM Pursuant to Either an Express or Implied Contract

The overwhelming evidence in this case shows that Marcia was not in the service of ERM pursuant to either an express or implied contract of hire. Obviously, there was no express contract since there was never any form of writing outlining the arrangement between Byron Van Til, Marcia's husband, and ERM. There was also no implied contract between Marcia and ERM. An implied contract "arises when services are to be performed by **one who at the time expects compensation from another who expects at the time to pay therefore**. *Reed*, 473 Mich at 531 (quoting *In Re Spencer Estate*, 341 Mich 491, 493; 67 NW2d 730 (1954); *In re Pierson's Estate*, 282 Mich 411, 415; 267 NW 498 (1937) (emphasis added). In *Reed*, this Court found that an implied contract existed because the owner of the company expressly told one of his employees to obtain help with the deliveries and "expected to compensate whomever Hadley [the

employee] recruited. *Id.* at 531. Ultimately, this Court held that the employee that hired the plaintiff was an agent of his employer who was given express authority to hire. *Id.*

In this case, the factual evidence is clear that Byron Van Til, ERM's employee, sought the permission of his employer to hire his wife, Marcia, to help him strip and wax the floors, which ERM refused to do. Unlike the employee in *Reed*, Byron was not an agent of his employer nor was he given any authority, express or otherwise, to hire his wife. Byron was, however, expressly informed by ERM that his wife could help, but that ERM **would not** hire her or pay her. Deposition of Byron Van Til, pgs. 60-62 *(Appendix 227a-229a);* Deposition of Steve Koster, pg. 12 *(Appendix 240a)*.

All that ERM was willing to do was to allow Marcia to help her husband strip and wax the floors and pay Byron, ERM's employee, for the value of the work done. What is abundantly clear from the facts of this case is that ERM was not willing to hire Marcia or pay her for any work that she performed on that day. Simply because ERM would now like to change these facts to avoid a tort claim does not change the factual scenario under which ERM agreed to allow Marcia to help.

The fundamental difference between this case and the *Reed* case in which this Court found that the plaintiff was an employee is that unlike *Reed* who "was expecting to be compensated for the services he had performed that day," Marcia was not and never did expect compensation for helping her husband on the day of this incident nor did ERM expect to pay Marcia. Why? Because ERM made it blatantly clear that they were not willing to hire her as an employee or pay her. What ERM was willing to do, however, was to pay for the value of the services performed to Marcia's husband, Byron

Van Til, who ultimately was ERM's employee and responsible for stripping and waxing the floors as its janitorial employee.

The Court of Appeals, however, held that Marcia was an employee because ERM agreed to pay Byron for the time it took to strip and wax the floors. Court of Appeals' Unpublished Opinion dated February 10, 2005 at pg. 4 *(Appendix 190a)*. This "arrangement," according to the Court of Appeals, somehow equated to an implied "contract of hire." Such a holding is inconsistent with the facts of this case and the test set forth in *Hoste.* The trial court hit the nail on the head in its Opinion and Order dated July 18, 2003, when it concluded that Marcia was a "gratuitous worker. . .an individual assisting another. . ." *(Appendix 22a)*. The trial court expressly recognized, and correctly so, that Marcia was not paid for helping her husband and the money paid to Byron Van Til was not "payment intended as wages" with regard to Marcia. The trial court also correctly recognized that ERM did nothing more than pay Byron Van Til, its employee, for the job that was done. Opinion and Order dated July 18, 2003, at pg. 4; *(Appendix 25a)*.

ERM's express words and its actions show that Marcia Van Til was a volunteer who helped her husband one Saturday. *Groulx v Carlson,* 176 Mich App 484, 491; 440 NW2d 644 (1989). The Supreme Court in *Higgins* v *Monroe Evening News*, 404 Mich 1, 272 N.W.2d 537 (1978) and *Hoste* recognized that work could be done in "social relationships" and by "volunteers." Such volunteers do not become employees when injured where the company (ERM) made a deliberate decision to circumvent the entire system by deciding not to hire that person (Marcia). Simply because ERM allowed Marcia to come and help her husband does not make her their employee. ERM passed

on that opportunity. Thus, Marcia was merely a gratuitous worker that was assisting her husband.

B. The Relationship Between Marcia and ERM was not "Of Hire"

Since there was not an express or implied contractual relationship between Marcia and ERM, the relationship cannot legally be deemed "of hire." *Hoste*, *supra*. at 575. The test set forth in *Hoste* requires that for someone to be in the service of another, there must be a contractual relationship, either by express terms or implied by the relationship. *Id.* Because the facts of this case do not give rise to either an express or implied contractual relationship, Marcia Van Til cannot be deemed ERM's employee.

Even if this Court could somehow construe the facts (as did the Court of Appeals) to find an implied contractual relationship, the relationship was not "of hire." As explained in *Hoste*, the key to determining whether a contract is "of hire" is whether the compensation [assuming there was compensation paid] for the services performed was not merely a gratuity, **but rather, "payment intended as wages, i.e., real, palpable, and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer.**" *Id.* at 576 (emphasis added).

The record shows nothing except that Marcia never received any amount of money from ERM intended as wages. It was her husband, Byron, who received payment intended as wages for his normal job. Marcia took a couple of hours on a Saturday morning to assist her husband and, as a result, sustained serious burn injuries to her legs. ERM's payment to its own employee is not payment to Marcia and is

certainly not sufficient to be real, palpable or substantial consideration such that a reasonable person would expect in exchange to forfeit her right to pursue a tort claim. She did not believe so nor did ERM on this factual record.

ERM did not notify its worker's compensation carrier, it did not file a notice of injury report with the Bureau, and only talked to its true employee, Byron. ERM then offered Marcia money to settle her claim—a tort claim. Why? Because ERM knew that it did not have an employer-employee relationship with Marcia since they refused to hire her. ERM knew, as well as Marcia, that there had been nothing real, palpable or substantial exchanged between them, which would have induced Marcia to give up her right to bring a tort claim, nor was the "arrangement" between ERM and Byron expected to be understood by ERM as meaning that Marcia was giving up her right to sue.

As further noted in *Hoste*, *supra.*, pg. 580, n 2 (dissent) (citing 3 Larson, Workmen's Compensation Law, 47.10 pgs. 8-304-8-310):

> Compensation law, however, is a mutual arrangement between the employer and employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but also mandatory to resort to the agreement between them to discover their relationship.

In this case, the only arrangement that existed was between Marcia's husband, Byron, ERM's employee, and ERM. This arrangement between Byron Van Til and ERM did not involve hiring Marcia as ERM's employee or for ERM to pay her for any time she spent in helping her husband strip and wax the floors at their facility. The arrangement was that Byron Van Til could have his wife help him and that **he** would be paid for the value of the job that was done, and he was paid (the value of which was dependent on whether he worked overtime or not). It is no more or less complicated than that.

Based on the overwhelming factual evidence in this case, neither Marcia nor ERM gave up or gained anything. The only thing arguably that Marcia gained was the knowledge and satisfaction that she helped her husband complete a laborious task that would have had him at work for a whole day on the weekend. ERM also never gave up or received anything since it did not pay any more for the job than it would have paid Byron without any help from anyone. It did not have to go through the hassle of hiring Marcia. In fact, ERM didn't want to bother with hiring her, so they did not. ERM was going to get its facilities floors stripped and waxed whether Marcia helped her husband or not. Clearly, the relationship that existed between ERM and Marcia is not sufficient to satisfy the "of hire" requirement under *Hoste*.

Similar to the arrangement in this case was the one in *Higgins* v *Monroe Evening News*, 404 Mich 1, 272 N.W.2d 537 (1978) where this Court found that there was no bargained for exchange between the parties. *Id.* at 21. In *Higgins,* a newspaper carrier's friend was injured while accompanying him on his route. In that case, this Court found that the relationship was merely "social." *Id.* As in this case, there was a "social relationship" pursuant to which one person (Marcia) offered to "help" another (her husband), but which "associations are not based upon an employment relationship." *Id.* ERM and Marcia had no arrangements, no discussions, no promises, and certainly no intent to suffer a detriment to receive any benefit or an agreement to exchange any form of detriment for a benefit. This was a wife agreeing to volunteer her time to help her husband even after her husband volunteered her services and informed her that ERM was not willing to hire her or pay her for her time. As such, Marcia cannot be factually or legally deemed an employee of ERM.

III. THE TRIAL COURT ERRED IN HOLDING THAT ERM WAS THE STATUTORY EMPLOYER OF MARCIA BECAUSE THE FACT OF THIS CASE ARE INAPPLICABLE TO THE ENTIRE STATUTORY SCHEME

In its Opinion and Order dated July 18, 2003, the trial court held that ERM was the statutory employer of Marcia. *(Appendix 22a)*. On appeal to the Court of Appeals, the issue was rendered moot, which counsel for Plaintiff-Appellant believes was due to the fact the entire argument by Defendant-Appellee is completely inappropriate to the facts of this case. Counsel for ERM, however, has a different opinion and has again raised the statutory employer doctrine. In its Brief in Opposition to Application for Leave to Appeal, ERM basically argued that even if this Court does not find that Marcia is an employee, her claims are still barred by the statutory employer doctrine, MCL 418.171. *(Appendix 265a)*.

This Court does not need to look beyond the goals and purpose of this statute to know that the facts of this case do not fall within the statutory scheme of MCL 418.171 *(Appendix 265a)*. The ruling that ERM was the statutory employer of Marcia by the trial court was erroneous as it completely disregards the plain language of the statute and the case law interpreting the statute. The statute and case law interpreting the statute—MCL 418.171 *(Appendix 265a)*—make it obvious that the facts of this case were not what the legislature sought or intended to prevent with the enactment of this statute. The finding by the trial court completely misconstrues and distorts the entire statutory scheme of MCL 418.171 *(Appendix 265a)*.

This Court did an in-depth statutory analysis of this very statute in *Williams v Lang*, 415 Mich 179; 327 NW2d 240 (1982). In interpreting the plain meaning of the statutory employer statute, this Court stated:

> What then is very plain? What is plain is that the statutory provision makes the principal liable for benefit payments, *if* the employee of the [uninsured] contractor makes a claim for injury 'for the execution by or under the contract * * * of any work *undertaken* by the [insured] principal' (emphasis added). In other words, if the principal 'undertakes' 'any work' to be performed 'by or under the contractor,' and an employee of the contractor in the 'execution' thereof is injured, the principal must pay workers' compensation benefits—**because the principal picked a contractor who was not insured.** (emphasis added).
>
> In addressing the goals of the statute, the Supreme Court further stated:
>
> When analyzing the elements of the statute, it is immediately apparent that this provision was adopted **to achieve the important goal of protecting a specific class of employees in two interrelated ways: (1) to prevent the evasion of the compensation system by both principals and contractors; and** (2) to lift the financial burden from injured employees who work for uninsured contractors.

Id., pg.195-96.

Clearly, Marcia Van Til does not fall within the "class of employees" to be protected by this statute because (1) she was not an employee of either Byron Van Til or ERM, (2) she was not employed by a contractor attempting the evade the worker's compensation system, and (3) she was not an employee who was injured while working for an uninsured contractor or anyone else, as the trial court correctly held in its Opinion and Order dated June 2, 2003 *(Appendix 17a)*.

In the instant case, there are vital facts that are lacking that are required in order for the statutory doctrine to come into play. The premise of the statutory employer doctrine is simple: "[w]hen a principal covered by the WDCA contracts with a contractor not covered by the WDCA and an employee of the contractor is injured, the principal is liable for WDC benefits." *Williams*, *supra*, at 196. The essential facts that are completely lacking in this case for ERM to be determined the statutory employer of Marcia are: (1) a contract between a principal and an uninsured contractor, (2) an

employee of a contractor who was injured while working for a contractor, let alone an uninsured contractor, and (3) no payment of wages to Marcia. As such, the trial court's ruling that ERM is the statutory employer of Marcia is incorrect as a matter of law and must be reversed.

A. There is No Contract Between a Principal and an Uninsured Contractor

The crux of ERM's and the trial court's misapplication of the statute occurs when it attempts to paint Byron Van Til as a contractor. Byron Van Til cannot be deemed a contractor either factually or legally. ERM argues to the contrary in a couple different, obscure ways. First, ERM argued that a contract arises out of an employment relationship thus placing ERM and Byron Van Til in a "principal" and "contractor" relationship, Next, because Byron Van Til was not subject to the WDCA, (Defendant-Appellee/Cross-Appellant ERM's Joint Appellee/Cross-Appellant Brief, pgs. 12-13; *(Appendix 55a-56a)*), and lastly, because Byron meets the definition of a contractor contained within the statute (Defendant-Appellee/Cross-Appellant ERM's Joint Appellee/Cross-Appellant Brief, pg. 16; *(Appendix 59a)*).

What the undisputed facts demonstrate is that the relationship between ERM and Byron Van Til is that of a simple employee/employer. (Affidavit of Byron Van Til, pgs. 1-3 *(Appendix 250a-252a)*; Deposition of Byron Van Til, pgs. 13-14 *(Appendix 220a-221a*). Even if the employment relationship between ERM and Byron Van Til was viewed as a contractual one, like most employment contracts, ERM cannot make the leap from a basic employment relationship to a "principal" and "contractor" relationship. Such an argument flies in the face of reason and the facts. According to this line of reasoning, anytime Byron Van Til sweeps the floors or empties the wastebaskets he is

acting in the capacity of "contractor." ERM has no evidence to support this position and even Byron testified he is a janitor for ERM cleaning, snowplowing, etc., (Deposition of Byron Van Til, p. 13 *(Appendix 220a)*).

On a broader level, this argument suggests that anytime any person enters into an employment relationship the employee is a "contractor"—the cashier at a fast food chain, the sales clerk in a department store and so on. The factual context contemplated by this statute is limited to those of contractors and subcontractors whose employees are injured and without any recourse against his or her employer, not regular employees like Byron Van Til. *See Williams*, *supra*, pg. 196 (stating that the Legislature has "imposed an obligation on principals, who elect to have 'the whole or any part of [their] work' performed by contractors, to ensure that such contractors are covered under the WDCA or to be liable for the compensation of the workers of such contractors themselves"); *Blanzy v Brigadier General Contractors, Inc.,* 240 Mich App 632, 639-40; 613 NW2d 391 (2000) (stating that the "ostensible purpose of § 171 is to protect the employees of a subcontractor where the subcontractor fails to satisfy its obligation under § 611); and *Burger v Midland Cogeneration Venture*, 202 Mich App 310, 313; 507 NW2d 827 (1993) ("[r]ecognizing that employees in certain industries may not be adequately covered, the Legislature enacted § 171 of the act to ensure that workers' compensation coverage is extended to employees of contractors and subcontractors. . .").

ERM's definition of a contractor derived from MCL 418.171 *(Appendix 265a)* conveniently omits a vital portion of the statute. (Defendant-Appellee/Cross-Appellant ERM's Joint Appellee/Cross-Appellant Brief, pgs. 10-11 *(Appendix 53a-54a)*). The

statute refers to a "contractor" as any other person with whom a principal contracts "who is not subject to this act or who has not complied with the provisions of section 611. . ." *See* MCL 418.171 *(Appendix 265a)*. Byron Van Til does not meet either of those requirements. As an employee of ERM Byron Van Til is "subject to" the WDCA. *See* MCL 418.111 *(Appendix 256a)*. Byron Van Til also did not fail to comply with the act because he is not required to since he is an employee and not an employer. *See* MCL 418.115 *(Appendix 257a)*. (*See also* Plaintiff-Appellant's Reply to Defendants-Appellee ERM's Joint Appellee/Cross-Appellant Brief on the Issues Raised in Plaintiff-Appellant's Appeal Brief, pg.4 *(Appendix 179a)*).

ERM next contends that Plaintiff-Appellant misconstrued the statute by arguing that the "standard" or "traditional" contractor/subcontractor relationship is required for the statutory employer doctrine to apply. ERM misunderstood Plaintiff-Appellant's argument. Marcia Van Til argued in its Court of Appeal's Brief that MCL 418.171 *(Appendix 265a)* is premised upon a principal and contractor relationship—two different employers. For instance, in *Williams* the defendant gas station owner was the uninsured employer of the employee and the principal was the [insured] employer of the gas station owner. In this case, Byron Van Til is not the uninsured employer of Marcia Van Til. See Affidavit of Marcia Van Til, pg, 2 *(Appendix 254a);* Deposition of Byron Van Til, pg. 60 *(Appendix 227a)*. He is the employee of ERM, not a contractor or an employer. The individual factors relied on by this Court in the *Williams* case to make a legal determination that defendant oil company was the statutory employer of the plaintiff were: (1) Gulf-Boyle was an employer insured under the WDCA; (2) Lang was an employer uninsured under the WDCA; (3) Gulf-Boyle contracted with Lang; (4) Plaintiff

was employed by Lang; (5) Plaintiff was injured while employed under Lang in the execution of work. *Williams*, *supra*, pg. 205.

The factual findings necessary for the trial court to make a legal determination that ERM is the statutory employer of Marcia Van Til were not made because they do not exist. The individual factors in this case only emphasize the faulty reasoning of the trial court in finding that ERM is the statutory employer of Marcia Van Til: (1) ERM is an employer insured under the WDCA. Defendant-Appellee/Cross-Appellant ERM's Joint Appellee/Cross-Appellant Brief, pg. 5 *(Appendix 48a)* (2) Byron Van Til is not an employer or an uninsured contractor under the WDCA. See Affidavit of Byron Van Til, ¶¶ 6-10 *(Appendix 251a-252a)*; Deposition of Byron Van Til, pgs. 60-62 *(Appendix 227a-229a)*; (3) ERM did not separately "contract" with Byron Van Til for the stripping and waxing of floors. This was part of his employment as a janitorial employee of ERM. See Affidavit of Byron Van Til, ¶ 8 *(Appendix 251a)*; Deposition of Byron Van Til, pgs. 13, 61 *(Appendix 220a and 228a)*; (4) Marcia Van Til is not employed by Byron Van Til. Affidavit of Marcia Van Til, ¶ 3 *(Appendix 254a)*; (5) Marcia was not injured while employed under Byron Van Til or ERM in the execution of work. Marcia Van Til Affidavit, ¶¶ 3-10 *(Appendix 254a)*; Deposition of Marcia Van Til, pg. 53 *(Appendix 235a)*.

The statutory scheme of MCL 418.171 *(Appendix 265a)* was not designed to allow employers such as ERM after the fact and in litigation to create a "contractor status" of its ordinary janitor simply for the purpose of avoiding tort liability. Its primary goal and purpose is to provide compensation for employees of uninsured employers in order to alleviate the financial hardship to the employee and place it on the one in the

better position to endure such hardship—the principal. Not a single fact in this case supports the lower court's ruling that ERM is the statutory employer of Marcia Van Til. Marcia Van Til was simply a loyal spouse helping her husband do his normal job for a few hours, with ERM's permission, and got hurt. See *Hoste*. Marcia Van Til is a volunteer helper who did not give up her right to sue in tort. She did not get paid wages and is not subject to the WDCA under sections 161 or 171.

B. Plaintiff-Appellant Was Not An Employee Injured While Working Under a Contractor

Because Byron Van Til cannot legally be construed a contractor as he is ERM's employee, it only goes to reason that Marcia Van Til cannot be deemed the employee of Byron Van Til. Assuming for the sake of argument that Byron Van Til could legally be construed a "contractor," ERM contends that MCL 418.171 *(Appendix 265a)* does not require a showing by it that Marcia Van Til was an employee of Byron Van Til, despite the plain language of the statute itself and the holding by the Court of Appeal's in *Blanzy*. *Blanzy*, *supra*,pg.640; *see also* MCL 418.171 *(Appendix 265a)*. This argument undermines the entire purpose of the WDCA. The WDCA was designed to require employers to provide compensation to employees for injuries suffered in the course of the employee's employment. *Hoste, supra*, at 570. Thus, in order to even be eligible for workers compensation benefits, a person must first be classified an employee. *See* MCL 418.131 *(Appendix 259a)*. Because Marcia Van Til is not an employee of either ERM or Byron Van Til, and she received no payment intended as wages, she is not subject to the exclusive remedy of worker's compensation.

ERM then alleges that § 418.171 *(Appendix 265a)* was intended to provide benefits for "casual **employees**" of contractors, thus negating the requirement of a

"formalized" employment relationship. Defendant-Appellee/Cross-Appellant ERM's Joint Appellee/Cross-Appellant Brief, pg. 18 *(Appendix 61a)*). This contention only supports the Court of Appeal's proposition in *Blanzy* that a person must first be deemed an employee, casual or otherwise, of the contractor before the statutory employer doctrine can be applied. *Blanzy, supra*,pg.640. Specifically, ERM cites to MCL 418.171(3) *(Appendix 265a)*, which provides that the only persons subject to this statute are principals and contractors, unless the contractor engages independent contractors.

The statute as a whole and its unambiguous terms, consistent with basic rules of statutory construction, reveals ERM's complete misunderstanding of the statute and its requirements. For instance, MCL 418.171(1) *(Appendix 265a)* states, " . . . the principal shall be liable to pay any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal." Further, the second sentence of MCL 418.171(2) *(Appendix 265a)* states, "[t]he employee shall not be entitled to recover at common law against the contractor for damages. . . ." The statute alone makes it evident that a person must first be deemed an employee of the contractor before MCL 418.171 *(Appendix 265a)* can apply. Irrespective of the "type" of employment relationship—formal or informal—the statutory employer doctrine mandates a finding that the individual be an employee before it can be applied.

The tests utilized by the courts in determining whether the statutory employer doctrine applies is also instructive in that a person must first be deemed an employee of the contractor under MCL 418.161 *(Appendix 260a)* before MCL 418.171 *(Appendix 265a)* can apply. For example, in *Williams*, the test used by the this Court was: "did

the plaintiff employee of the uninsured contractor make a claim for benefits for the injuries occurred during work executed under the contractor for work 'undertaken by the [insured] principal.'" *Williams*, *supra*, pg.192. Marcia Van Til is not an employee of either ERM, of an uninsured contractor, or of Byron Van Til. Thus, she cannot be held, as a matter of law, a statutory employee of ERM. In order for this Court to affirm the decision of the trial court, it must not only disregard, but also defy, the entire purpose and goal of the Legislature in enacting MCL 418.171 *(Appendix 265a)*.

The ruling by the trial court that Marcia was not an employee of ERM at the time of this incident is correct. ERM did not ever consider Marcia an employee of it or her husband, Byron, until after the Complaint was filed. Despite ERM's assertion to the contrary, the WDCA will in no way be thwarted by this Court finding that Marcia was not an employee of ERM. If anything, it will ensure better procedures and protocols in these circumstances. Under *Hoste*, Marcia was simply a volunteer, a gratuitous helper to her spouse one Saturday for which Byron was paid. It was ERM, not Byron or Marcia, that made the decision to throw caution to the wind and take a chance by not hiring or paying Marcia, but allow her to come onto the premises anyway and help her husband. Now, ERM wants this Court to let it change the facts by affirming the decision of the Court of Appeals that Marcia Van Til was its employee, despite ERM's outright refusal to consider her one until a Complaint was filed and tactical legal arguments were made by counsel.

The trial court was correct in finding that Marcia Van Til was not an employee of ERM at the time of this incident because (1) there was no meeting of the minds nor any agreement for her to be an employee of ERM or Byron; (2) ERM did not hire her; (3)

Byron did not hire her, nor could he; (4) ERM did not pay her; (4) Byron Van Til was not and never has been a "contractor"; and (5) ERM tried to settle Marcia's tort claim immediately after this incident occurred because it knew neither she nor ERM viewed this as an employment relationship.

CONCLUSION

The broad grant of original jurisdiction to the circuit courts by the Michigan Constitution and MCL 600.605 *(Appendix 275a)* without an express prohibition anywhere in the WDCA that limits the circuit courts subject matter jurisdiction emphasizes the fact that the circuit courts share concurrent jurisdiction with the WDCB to decide whether an injured plaintiff is an employee. Since there is no clear mandate by law to the contrary, this Court should not divest the circuit court of jurisdiction to the Bureau. Even if MCL 418.841(1) *(Appendix 269a)* raised any doubt as to the exclusiveness of the bureau's jurisdiction, that doubt is to be resolved in favor of retaining jurisdiction in the circuit courts. However, the statute does not even call into question the circuit courts ability to hear tort claims that contain affirmative defenses of the employee-employer relationship. As such, this Court's decision in *Sewell* was correctly decided.

The Court of Appeals erred when it found that Marcia Van Til was an employee of ERM as it misconstrued the application of the *Hoste* test. The trial court correctly held that Marcia Van Til was not an employee, but a "gratuitous worker . . . an individual assisting another" based on the facts of this case. The facts show that neither ERM nor Marcia considered her an employee at the time of this incident. The fact that ERM now does is no surprise, but it is factually and legally incorrect. It is beyond

question that ERM refused to hire Marcia and never paid her any payment intended as wages. ERM paid its own janitorial employee for a job that was in the normal course of his job duties.

Significantly, there was never any express or implied contract between ERM or Marcia and certainly not a contractual relationship that would qualify as "of hire." Unlike the *Reed* case, ERM did not expect to pay Marcia and Marcia did not expect payment from ERM. Further, the fact that ERM never spoke with Marcia until after this incident demonstrates that there was never any agreement, silent or otherwise, to exchange any benefit for a detriment and vice versus. Volunteering to help her husband and then paying him for the job that was completed in no way amounted to "payment intended as wage," i.e. real, palpable and substantial" enough to induce a reasonable person, such as Marcia, to give up her right to sue nor was it understood as such by ERM. That is the *Hoste* test.

There are fundamental facts lacking in this case, which are required in order for ERM to make out a successful statutory employer argument under MCL 418.171 *(Appendix 265a)*. Specifically, there is no contract between a principal and uninsured contractor (or insured contractor) and no employee who was injured while working for an uninsured contractor. The trial court failed to make these vital findings of fact before making its legal determination that ERM is the statutory employer of Marcia Van Til. There is also its finding under § 161 that Marcia was not an employee because she received no payment intended as wages. Therefore, the trial court's Opinion and Order finding that ERM was a statutory employer under § 171 must be reversed.

RELIEF REQUESTED

For the foregoing reasons, Plaintiff-Appellant requests that this court reverse the Court of Appeals decision dated February 10, 2005 *(Appendix 187a)* and the July 18, 2003 Opinion and Order *(Appendix 22a)* by the trial court (and effectively the August 8 and 22, 2003 Opinions and Orders *(Appendix 29a and 30a)*) and reinstate the June 2, 2003 Opinion and Order *(Appendix 17a)*. At a minimum, Plaintiff requests that this Court remand this case to the trial court because of the genuine issues of material fact that exist that preclude summary disposition for Defendant-Appellee ERM. In the alternative, if the Court determines that concurrent jurisdiction does not exist, Plaintiff-Appellant requests a ruling as in the *Reed* case given the uncertainty of the jurisdictional question or alternatively a stay in the lower court while a determination is made in the Bureau.

Respectfully Submitted,

HALPERT, WESTON, WUORI & SAWUSCH, P.C.

Dated: December 27, 2005

By:_____

Thomas J. Wuori (P41096)
Deborah K. Palmer (P67957)
Attorneys for Plaintiff-Appellant
136 E. Michigan Ave., Ste. 1050
Kalamazoo, MI 49007
Telephone: 269-388-4800